Supreme Court, U.S.
FILED
NOV 30 1995
CLERK

(2)

No. 95-277

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KATHERINE ANN POWER, *Petitioner*,

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to review the constitutionality of a condition of probation which forbade petitioner from profiting from her crimes, where the condition was imposed with the petitioner's consent, where she declined the opportunity of withdrawing her guilty plea if she did not agree to the condition, and where, consistent with the approach taken by other courts, the lower court found the condition reasonably related to the purposes of criminal sentencing and probation.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Commonwealth of Massachusetts respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 420 Mass. 410, 650 N.E.2d 87 (1995).

STATEMENT OF THE CASE

During the summer of 1970, five individuals formed a group which planned to commit various criminal acts throughout the United States. (Tr. 9/15/93 20). On September 23, 1970, petitioner Katherine Ann Power, along with four others, robbed the State Street Bank and Trust Company in the Brighton section of Boston. Three of her cohorts entered the bank, armed, and robbed the tellers of over $26,000. A fourth participant, William Gilday, armed with a fully loaded Thompson submachine gun, positioned himself in a car across the street from the bank. Power sat in a "switch car" several blocks away ready to drive the others from the scene after the robbery was completed.

Boston police officers Walter Schroeder and Frank Callahan responded to the bank's silent alarms which had been triggered when the robbers entered. The robbers had left the bank by the time the officers arrived and were heading for the "switch car"; Gilday remained on the scene as a lookout. When Officer Schroeder approached the front door of the bank, he was shot in the back by Gilday and died of his wounds the following day. Commonwealth v. Power, 420 Mass. 410, 650 N.E.2d 87, 88 (1995).

Three of the robbers were arrested within days of the crimes; a fourth eluded authorities until 1975 when she was apprehended in Pennsylvania. Power remained a fugitive for twenty-three years. On September 15, 1993, "in the glare of national news media attention," Power surrendered to state and federal authorities. Id. at 412, 650 N.E.2d at 88.[1]

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[1] At the sentencing hearing, the Court and the parties referred to Power's lengthy fugitive status and extensive negotiations between government authorities and Power

On September 15, 1993, represented by counsel, petitioner offered to plead guilty to two indictments charging armed robbery and to so much of a murder indictment as charged manslaughter. After a full and complete colloquy, the Court accepted the pleas, and scheduled a sentencing hearing for October 6, 1993.

Pursuant to its agreement with petitioner, at the sentencing hearing on October 6, 1993, the government recommended she be sentenced to a state prison term of eight to twelve years; petitioner's attorney requested a shorter sentence. The judge reiterated what he had said during the plea proceeding: under Massachusetts law the judge is not bound to sentence in accordance with any agreement of the parties, but if the Court chooses to exceed the government's recommendation, the defendant may withdraw her guilty plea and proceed to trial.

The Court accepted the Commonwealth's recommended prison term for manslaughter and one of the two armed robbery counts. The judge, however, expressly indicated he intended to exceed the recommendation by imposing on one armed robbery count a twenty-year probationary sentence, with the special condition that Power not profit or benefit from her crimes. Under oath, and after consultation with counsel, Power accepted the condition of probation and specifically declined to withdraw her plea of guilty. She was then sentenced as the Court indicated it would do. The probation contract, which Power signed that day, outlines in more detail the terms of the special condition. Commonwealth v. Power, 420 Mass. at 413, 650 N.E.2d at 89. On appeal the Supreme Judicial Court

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preceding her surrender and plea. In addition to the state charges, she also faced federal charges.

affirmed the special condition, finding that while it implicated Power's First Amendment rights, it was reasonably related to a valid probation purpose. Commonwealth v. Power, 420 Mass. at 415, 421, 650 N.E.2d at 90, 93.[2]

Reasons For Denying The Writ

I. POWER AGREED TO ACCEPT THE SPECIAL CONDITION OF PROBATION AND DECLINED TO WITHDRAW HER GUILTY PLEA WHEN INFORMED THE COURT WOULD IMPOSE IT.

In Massachusetts, conditions of probation must be agreed to by the defendant. Massachusetts General Laws c. 276, § 87 provides the court the power to place a convicted

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[2] The procedural posture of Power's challenge to the special condition is somewhat unclear. In her brief to the Supreme Judicial Court, Power outlined her objection as having been raised in letters by counsel to the sentencing judge, and in a Motion for Reconsideration of Special Conditions of probation, claiming they were vague and in violation of the First Amendment. The Commonwealth argued below that Power failed to follow the proper procedures to challenge the condition. The Supreme Judicial Court referenced a Revise and Revoke motion not mentioned by the defendant, found the reconsideration motion akin to a Mass. R. Crim. P. 30 motion, and proceeded to consider the merits, "[t]he matter having been fully briefed and being of public interest." Commonwealth v. Power, 420 Mass. at 411 n.1, 650 N.E.2d at 88 n.1.

defendant, with his or her consent, on probation for such term and upon such conditions as the judge deems proper. Whether on a guilty plea or after trial, probationary conditions require the assent of the defendant. Commonwealth v. Cotter, 415 Mass. 183, 188, 612 N.E.2d 1145 (1993). The consent requirement distinguishes probation in Massachusetts from that in other jurisdictions or from a probationary sentence that is imposed by the court without a defendant's assent. There is no question that in this case the Court followed the proper procedures to verify Power's consent to the condition that she not profit from her crimes. Nor is there a suggestion that her consent, given in open court, under oath, was not voluntary or that the plea and sentencing proceedings were flawed.

Another important aspect of the petitioner's probationary condition is that it came as part of her guilty plea. She was specifically given the option, consistent with Massachusetts law, to withdraw her plea and go to trial should she not be willing to abide by the condition. It was not, as is often the case with challenged conditions of probation, imposed upon her against her will, nor was she required to accept the condition on pain of incarceration on that charge. Compare Commonwealth v. LaFrance, 402 Mass. 789, 791 n.3, 525 N.E.2d 379, 381 n.3 (1988).

Where "the voluntariness of a criminal defendant's concession to imposition of a particular sentence is questionable, the relevant inquiry is whether the sentencing stipulation was informed and uncoerced on the part of the defendant . . . ." Libretti v. United States, ___ U.S. ___, 1995 WL 648120 (Nov. 7, 1995). That a defendant makes the choice in connection with a plea simply does not render the election an impermissible abrogation of the defendant's rights. See McMann v. Richardson, 397 U.S. 759, 766-767, 770 (1970). A condition of probation which would

otherwise be unconstitutional, that results from a negotiated plea agreement, is not unconstitutional. See, e.g., United States v. Janko, 865 F.2d 1246, 1247 (11th Cir. 1989).

II. THE SUPREME JUDICIAL COURT'S DECISION UPHOLDING THE PROBATION CONDITION IS CONSISTENT WITH THE RULINGS OF THIS COURT AND THOSE OF OTHER JURISDICTIONS.

Fashioning appropriate probationary terms suitable to the offender and the offense requires the sentencing court be afforded considerable discretion. In fact, the "success of probation as a correctional tool is in large part tied to the flexibility within which it is permitted to operate." ABA Standards Relating to Probation § 3.3 commentary (Approved Draft 1970). This includes the imposition of restrictions that encroach to some degree on the probationer's personal liberties. All criminal sentencing involves to a greater or lesser degree, some restriction on the convicted defendant's behavior.

Petitioner agrees with the notion that probationers may be subject to restrictions that would be unconstitutional if applied to the general public. Petition at 5. She suggests, however, that there is some disagreement as to the proper inquiry for evaluation of the propriety of probationary conditions which implicate First Amendment rights. A review of the cases upon which she relies reveals that the distinction she posits is illusory. Moreover, petitioner cites no disagreement among lower courts as to the validity of any probationary condition similar to the one she challenges in this case.

The two other jurisdictions which have addressed the validity of a probation condition forbidding financial profit

similar to that imposed here upheld the conditions as reasonably related to the purposes of probation. In United States v. Terrigno, 838 F.2d 371 (9th Cir. 1987), the defendant was enjoined, as a condition of probation, from receiving money for speaking about her crimes, embezzlement and converting public funds. The condition stated that during her probationary period the defendant could "not receive any financial remuneration or any other thing of value from any speaking engagements, written publications, movies, or any other media coverage dealing with her involvement in this offense." Id. at 373. The Ninth Circuit found the condition reasonably related to the rehabilitation goal of probation: "We certainly cannot say it is unreasonable to think that the rehabilitation of a person . . . will be more effective if she is reminded in a very practical sense that 'crime does not pay.'" Id. at 374. The rehabilitative goal of preventing the defendant from profiting from her crime would neither deny the public the benefit of hearing her story nor unduly restrict her First Amendment rights. Id.

Similarly, in United States v. Waxman, 638 F. Supp. 1245 (E.D. Pa. 1986), the defendant who pleaded guilty to charges of art theft was restricted from any sort of financial profit from his well-publicized crimes. Rejecting a First Amendment challenge, the court found the probationary condition reasonably related to rehabilitation: "Certainly, it is in his own interest . . . to learn that society will neither tolerate criminal behavior nor permit the criminal to profit from it when he can be prevented from doing so." Id. at 1246.

The Supreme Judicial Court, in a thoughtful opinion, reviewed the cases from other jurisdictions addressing the basic questions implicated in this case and concluded, correctly, that probation conditions are enforceable even if

they affect a preferred right so long as the condition is primarily designed to meet the goals of sentencing and of probation. Commonwealth v. Power, 415 Mass. at 90, 650 N.E.2d at 89. Stating that merely because constitutional rights may be implicated the condition is not invalidated, the Court also recognized that restrictions are not without limitation where they bear no rational relationship to a valid sentencing goal or are simply overly offensive. Id.

United States v. Smith, 972 F.2d 960, 961-962 (8th Cir. 1992), which petitioner cites as standing for an analysis different than that undertaken by the Supreme Judicial Court, to be applied to a probationary condition affecting a fundamental right, Petition at 5, does no more than rely on the same cases which guided the Supreme Judicial Court's decision. In Smith, a probationer convicted of a narcotics offense was enjoined from causing the conception of a child with one other than his wife. The court sought to determine whether condition was proper under the factors in the Federal Probation Act, 18 U.S.C. § 3651 et seq., and found it unworkable and unrelated to the seriousness of the drug offense and to promoting respect for the law.

Every court that has considered probationary conditions has undertaken the same analysis, looking to see whether the conditions are reasonably related to the statutory purposes of probation and whether they are reasonably necessary to attain those purposes. The Supreme Judicial Court did not undertake a different analysis, and in fact quoted and relied upon the authorities petitioner now suggests state a different standard. E.g., United States v. Peete, 919 F.2d 1168 (6th Cir. 1990); United States v. Lowe, 654 F.2d 562 (9th Cir 1981); United States v. Tonry, 605 F.2d 144 (5th Cir. 1979). In fact, United States v. Terrigno, 838 F.2d at 374, which petitioner claims takes a "minority" approach, Petition at 6, indicates that "careful

review" is necessary when a probation condition restricts fundamental rights. This conclusion was relied upon in United States v. Peete, 919 F.2d at 1181, a case petitioner says undertakes a stricter analysis.

No authority cited by petitioner suggests that a probationary condition is subject to the same First Amendment scrutiny that applies to statutes or restrictions of general applicability. The so-called special scrutiny that is employed when reviewing probation conditions is no more than an inquiry whether the condition is drawn to achieve the purposes of probation.

For probation imposed in the federal courts, the test is limited to the stated purposes of 18 U.S.C. § 3651, and conditions must be reasonably related to and crafted to meet the statute's goals of rehabilitation of the offender and protection of the public. To the degree other jurisdictions require "careful analysis" to assure the condition is reasonably related when a fundamental right is implicated, the Supreme Judicial Court concurred and conducted that inquiry. "Careful review" does not imply a different standard of review.

Once it is determined that all courts that have reviewed probationary conditions under this test do so in essentially the same manner, this case stands for no more than the routine question whether the test was properly applied to the particular facts of this defendant and her circumstances and is a constitutionally unremarkable matter. In assessing the condition imposed by the Massachusetts court, the inquiry must be whether the condition serves the state's purposes in criminal sentencing. See Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) (in determining whether state's needs justify regulation applicable to probationers, Court must take regulation as interpreted by state courts). Massachusetts had declared the purposes of a

criminal sentence -- including probation -- go beyond those underlying the federal statute to include punishment, retribution and deterrence in addition to rehabilitation and public protection. Commonwealth v. Power, 420 Mass. at 414-415, 650 N.E.2d at 90. Thus any review of Power's probationary condition must be measured against those purposes, and not be strictly limited to the goals of the federal probation statute.[3]

Under this litmus, the probation condition imposed on Power furthers Massachusetts's sentencing goals. Allowing her to profit from her crime and her ability to evade apprehension would not serve to rehabilitate her. Rather, it would provide an undeserved reward for her behavior. The rehabilitation needs for one who, while pleading guilty, had remained a fugitive for years and surrendered only after lengthy negotiations, are acute. The condition also serves as a deterrent both to her and to the general public. As the Supreme Judicial Court held, by this condition this defendant and others similarly situated are "given to understand that the crime committed and her successful, albeit illegal, fugitive status of over twenty-three years will bring neither reward, benefit, or profit, and her rehabilitation and understanding of the depth of her criminality are enhanced." Commonwealth v. Power, 420 Mass. at 418, 650 N.E.2d at 91-92. The state may validly deter any expectation that

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[3] The practice of placing defendants on probation began in Massachusetts as part of the common law independent of statutory authorization. Buckley v. Quincy Division of the District Court, 395 Mass. 815, 817 n.2, 482 N.E.2d 511, 512 n.2 (1985).

those who commit notorious or sensational crimes[4] may reap large profits from their stories of those crimes. Moreover, every modern notion concerning the purposes of sentencing recognizes the retributive nature of sentencing. All sentences, including non-incarcerative sentences of probation, carry a measure of punishment and restriction on liberties enjoyed by those not convicted of criminal behavior. See United States v. Tolla, 781 F.2d 29, 35 (2d Cir. 1986); United States v. Tonry, 605 F.2d at 148. Any person who commits crimes against society, especially crimes of violence, can properly expect to be constrained in ways that may be characterized as punishment. It is no less true for sentences of probation than it is for prison sentences.[5]

The test employed to determine the validity of a probationary condition that implicates a First Amendment right is not altered by this Court's decision in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991). In Simon & Schuster this Court struck down New York's "Son of Sam" law providing that profits from speech related to any crime be placed in an escrow

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[4] The amicus National Victim Center pointed out below that Power was on the FBI's "Most Wanted" list for 14 years, making her one of the longest sought after women fugitives in FBI history. Christopher B. Daly, Woman Ends 23 Years as a Fugitive: Ex-Protester Pleads Guilty in Bank Heist, Wash. Post Sept. 16, 1993, at A1.

[5] It is not unusual for a probationary condition to run concurrent with a prison sentence if the purposes of the condition, be they to effectuate restitution, a stay away order, or prohibit profiting from crime, dictate that they be in place simultaneously with incarceration.

account for the benefit of crime victims, because the statute was overbroad as it reached to all persons engaged in expressive conduct in which they admitted some criminal conduct, regardless of whether they had been convicted. This Court also found the statute not narrowly tailored to meet its dual stated purposes of ensuring criminals do not profit from their crimes and in compensating victims of crime. The Court found no compelling interest in a statutory scheme which sought to compensate victims only from the criminal's "story telling" proceeds rather than his other assets. Id. at 119-120.

Power recognizes that her probation condition does not suffer from overbreadth. Petition at 7. This distinction is of critical importance. Unlike a statute with general applicability, the condition here is directed against one individual who has been convicted of serious offenses and is framed in terms of her particular circumstances. The condition does not irrationally attempt to compensate victims with profits of one type of speech. Rather, it is directly responsive to what this Court declared to be an "undisputed" compelling interest: "that criminals do not profit from their crimes." Id. at 119. Even where preventing a criminal from profiting from crime in some way burdens constitutionally protected rights, this Court has affirmed the government's "legitimate interest in depriving criminals of economic power." Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 631 (1989) (no right to use forfeitable assets to retain attorney or to exercise right to speak.)

Just as this Court has rejected strict scrutiny review of prison regulations affecting constitutional rights in favor of a reasonable relationship standard, Turner v. Safly, 482 U.S. 78 (1987), the demands of the criminal justice system and the purposes of sentencing process dictate the same result for review of probation conditions. The lower

standard of review is warranted because probationers, like prisoners, "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special conditions'." Griffin v. Wisconsin, 483 U.S. at 874, quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972). Even were the Court to conclude that conditions of probation which restrict a probationer's ability to profit financially from the story of his or her crime are subject to a strict scrutiny analysis, the condition here would survive as it furthers not only the general purposes of probation, but also because it rests upon a compelling state interest and is specifically tailored to achieve that end.

Contrary to Power's assertion, the Supreme Judicial Court did not effectively rule "that state courts have the discretionary authority to impose content-based restrictions on any speech, so long as the speaker has been convicted of a crime." Petition at 4. It held that the condition allows Power "to speak on any subject, including her crimes, whenever, and through whatever medium she desires. . . . The condition merely prohibits the defendant from profiting financially from speech about her crime or her experience as a fugitive."[6] Commonwealth v. Power, 420 Mass. at 415,

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[6] The Supreme Judicial Court allowed the record to be expanded to include information that Power appeared in a nationally televised interview with Barbara Walters on February 11, 1994, which was watched by millions of viewers. Prior to the decision of the Supreme Judicial Court, the New Yorker magazine and Boston Globe newspaper also published articles based on interviews with Power. See also Amicus Brief filed in the Supreme Judicial Court by the National Victim Center, which provided the Court with a copy of the Walters interview. The probation

650 N.E.2d at 90. This limitation on profit, while permitting unrestricted speech and expression, provides an appropriate limitation of the restriction that is necessary to achieve the compelling state interest.[7]

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department took no action against Power as the result of these interviews.

The expanded record also reveals that Power stated to her probation officer and to both the state court and the federal District Court under the pains of perjury that she has never had any intention of personally profiting financially from her "story."

[7] Reflective of the attention she received when she surrendered, and concerns expressed at the sentencing hearing that Power might well be characterized favorably not only for her actions but for her experience as a long-time fugitive, the court included within the probation order a restriction on those events undertaken and experienced by her while avoiding apprehension. This, too, was narrowly restricted to the demands of the particular case. (Tr. 10/6/93 8, 25-26, 30, 52.)

The suggestion that Power must have all speech pre-approved by her probation officer, or that the condition is impermissibly standardless and vague, is also belied by the specific terms and the narrow reach of the condition to prohibit only financial profit.

Conclusion

For all the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: November 30, 1995